No. 02-1029 (4)

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In The

Supreme Court of the United States

SNOHOMISH COUNTY; STEVEN HOLT,
Director, Snohomish County Department of
Planning and Development Services,

Petitioners,

v.

KIM GOBIN; GUY MADISON;
THE TULALIP TRIBES OF WASHINGTON,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICUS CURIAE THE TOWN OF LAC DU FLAMBEAU, WISCONSIN IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Town of Lac du Flambeau, Wisconsin (the "Town") is an unincorporated township created pursuant to 1999-2000 Wisconsin Statutes, § 60.01 and Wisconsin Constitution, Art. IV, § 23. Lac du Flambeau is located in Vilas County, a county located in northern Wisconsin, bordering the upper peninsula of Michigan. Lac du Flambeau includes within its boundaries the majority of the Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Tribe") Reservation. The Tribe is a federally recognized Tribe and the reservation encompasses more than 50,000 acres of land located in parts of Vilas, Iron and Oneida Counties. Approximately 50% of the reservation land is held in trust by the United States for the Tribe or individual tribal members or in a restricted fee status because the Tribe repurchased the land after its transfer to nonmembers. The remaining 50% of the reservation is owned by nontribal and tribal members in unrestricted fee simple. The assessed value of fee land owned by tribal members exceeds two million dollars and that ownership is scattered throughout the reservation. Nonmember owned fee land is likewise scattered throughout the reservation. The Town includes more than one hundred lakes within its boundaries, and is a popular vacation retreat for residents of several midwestern cities. Access to lands throughout the Town is freely obtained over a road system operated and maintained primarily by the Town.

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[1] The Town of Lac du Flambeau has secured the consent of all of the parties to the proceeding in the Court of Appeals and letters of consent are attached to this Brief. No party has authored any part of this Brief. Lac du Flambeau has paid for the legal fees and costs associated with the filing of this Brief.

The Town has a comprehensive ordinance governing zoning and land use for the entire township (the "Ordinance"). Lac du Flambeau has never attempted to enforce the Ordinance against non-fee simple land. The Tribe does not have a zoning ordinance. The Ordinance regulates land uses, sizes of parcels, lake and river classifications and prohibits contamination of land. Exclusive enforcement of the Ordinance lies with the Town.

Recently, while attempting to enforce the Ordinance, the Town has encountered challenges to its jurisdiction on reservation fee lands owned by tribal members. Because the Tribe has no ordinance regulating land use or zoning, individual tribal members are choosing to locate businesses on or extract natural resources from reservation fee land and develop said land in a manner which would be prohibited or regulated if attempted by nonmember fee owners. This distinction is problematic for several reasons. First, where member owned fee land adjoins nonmember owned fee land development in contravention of the Ordinance defeats or undermines the objectives of the Ordinance. Second, the difference in treatment of fee owned land offers incentives to members to develop fee lands in a manner prohibited by the Ordinance. Third, members seek to profit therefrom by selling such developed land to nonmembers who accept it in its developed state. Fourth, enforcement problems exist in determining jurisdiction because of joint ownership by married couples which include both tribal and nontribal members.

STATEMENT OF THE CASE

The Town of Lac du Flambeau, Wisconsin adopts the Statement of the Case in the Petition for a Writ of Certiorari filed by Petitioners.

SUMMARY OF ARGUMENT

1. This case presents a critical question concerning whether tribal members should be permitted to circumvent the application of local governmental land use regulations to their reservation fee lands based upon the tribal member's sole prerogative. In situations where Tribes do not have zoning or land use regulations, an incentive exists to motivate members to develop fee land without compliance with local nontribal regulation. Members have the option, pursuant to the Indian Reorganization Act, 25 U.S.C. § 465, of placing fee land into trust with the United States, thereby exempting it from local regulation. Disparate regulation of fee lands demonstrates that there could be as many different outcomes in the country as there are counties, towns, tribes and reservations. Those contradictions create substantial confusion, inhibit the reasoned imposition of land use and zoning regulations and permit abuse of member status for fee owned land.

2. This Court should accept the Petition for Writ of Certiorari because towns like Lac du Flambeau need to be able to rely on brightline standards in order to carry out their responsibilities to their electorate. If a local jurisdiction can be manipulated in its attempts to regulate land use, then local governments will face significant land use and environmental problems with limited tools to address these problems after the fact. Enforcement action in

communities which is thwarted by tribal member ownership of fee lands demonstrates that this is a national and widespread problem affecting the fundamental division of authority between Tribes and local governmental entities.

ARGUMENT

I. Principal of *In rem* Jurisdiction.

The decision by the Ninth Circuit places exclusive zoning and land use jurisdiction over reservation fee land in the hands of member owners. The decision should be evaluated in light of the Court's decision in *County of Yakima v. Federated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). In *County of Yakima*, the Court expressly left open the state's jurisdiction with respect to fee patented land:

> While the Burke Act proviso does not purport to describe the entire range of *In rem* jurisdiction states may exercise with respect to fee-patented reservation land, we think it does describe the entire range of "*jurisdiction to tax*." And that description is "taxation of . . . land."

County of Yakima, 502 U.S. at 268.

The quoted language states that *In rem* jurisdiction exists beyond the power to tax. At issue here is whether zoning or land use regulations constitute an authorized encumbrance of land under Sections 5 and 6 of the Indian General Allotment Act of 1887 (as amended and codified at 25 U.S.C. §§ 348 and 349).

Applying the reasoning that *In Rem* jurisdiction includes the zoning or land use regulation is a reasonable extension of *County of Yakima*. It is the *In Rem* status that

must be emphasized and not the concept of alienation as relied upon by the Court of Appeals. *Gobin v. Snohomish County*, 304 F.3d 909, 917 (9th Cir. 2002). The Court should grant the Petition to evaluate the relationship between *In Rem* jurisdiction and land use regulation. The ability to alienate fee land should be subject to the Petitioner's right to restrict the land by zoning ordinance.

II. Meaning of Encumbrance.

The Court of Appeals found that the term "encumbrance" was inherently ambiguous and that the prepositional phrase "of land" limited the scope of permissible encumbrances. 304 F.3d 909, 916. Because a land use regulation does not burden land itself but rather, burdens uses to which land is put, the Court of Appeals concluded that land use regulations resembled excise taxes in *County of Yakima* and were not inextricably linked to the land itself. 304 F.3d 909, 917. The Court of Appeals applied the same analysis to the words "taxation of land" as the words "incumbrance of land." However, encumbrance has a different meaning than taxation. The analogy to the excise tax in *County of Yakima* is unwarranted. It fails to analyze the difference between taxation and encumbrance of land.

The analysis ignores the fact that land use ordinances regulate the land itself and permit enforcement against the land regardless of ownership. This Court should examine the word encumbrance and interpret its meaning to include land use regulations and restrictions as suggested by *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 667 n.20 (9th Cir. 1975), *cert. denied*, 429

U.S. 1038 (1977). If a land use regulation does not constitute an encumbrance of land, it is difficult to conjure what does.

III. Exceptional Circumstances Test.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-220, the Court examined in detail the tribal interests connecting those interests to the economic livelihood of the Tribe. Based upon that finding, the Court concluded that self-determination and economic development, both congressional goals, could not be achieved if state regulation of bingo games was permitted. The analysis by the Ninth Circuit in this case did not follow that approach. The balancing test that appears to be required by *Cabazon Band* was never applied. The Court of Appeals did not analyze tribal interests of Indian sovereignty, tribal self-determination, self-sufficiency and economic development. Instead, the Court established the Tribe's interests to be overwhelming without evaluation and minimized the Counties' interests. 304 F.3d 909 at 918.

The evaluation of exceptional circumstances which was set forth in *Cabazon Band* included an exhaustive examination of the important federal interests involved and the significance of those interests to the self-determination and economic development of the Cabazon and Morongo Reservations. 480 U.S. at 219. The decision of the Court of Appeals fails to evaluate either tribal interests or federal interests which would be advanced by preventing the application of the County zoning ordinance to the plaintiffs. The analysis also failed to consider the difference between fee land and non-fee land in terms of

tribal interests. Fee land is unfettered by tribal regulation if it is owned by a tribal member. Non-fee land is frequently controlled directly or indirectly by the Tribe without necessity for zoning rules and land use regulations. Those distinctions could be decisive in a *Cabazon*-type evaluation.

In *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), this Court held that tribal sovereignty is diminished on fee lands. This Court ruled that the impact of challenged uses had to be evaluated in terms of their impact upon political integrity, economic security, or the health and welfare of the Tribe. The *Brendale* decision suggests that the impact of local zoning on fee land must be serious and imperil the political integrity, economic security, or health and welfare of the Tribe in order for local zoning to be exercised. That analysis is lacking in the Court of Appeals' decision here.

IV. Impact of Court of Appeals' decision upon local municipalities.

Members who purchase and develop fee land on reservations can, by doing so without compliance with local zoning rules, adversely affect the autonomy of the reservation. This occurs because prices of fee land increase relative to the profits that could be generated due to non-regulated development. If reservation fee land prices increase, then the cost to other tribal members or the Tribe itself would likewise increase. This result could undermine the ability of Tribes to reacquire fee land or to attract nonresident members back to the reservation.

Permitting tribal members to develop fee land without restriction could jeopardize neighborhood, environmental,

health and safety, or other public values deemed essential by the community. The injurious effects would be felt by Tribes and communities alike.

Fee land is routinely bought and sold within reservation boundaries to members and nonmembers alike. Consequently, on most reservations an active market exists for this property. Conversely, for non-fee land virtually no market exists because that property does not change hands and historically remains in trust for the Tribe or individual tribal members. As a result, a natural distinction exists in everyday activity between fee land and non-fee land on most reservations. This distinction is recognized by activities of appraisers, realtors, contractors and assessors. This distinction exists and is well established in the day-to-day patterns of activity on reservations throughout the country. In *Brendale*, this Court recognized that in that case:

> "zoning authority could vest variously in the county and the Tribe, switching back and forth between the two. . . . Uncertainty of this kind would not further the interests of . . . the Tribe . . . and would be chaotic for landowners."

Brendale at p. 430.

Uniform application of land use and zoning regulations to all reservation fee lands would further interests of Tribes and local governments. Such enforcement would be easily explained and understood by the public.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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